No. 96-536

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

H.J. HEINZ CO., HEINZ ITALIA, S.p.A., HEINZ DOLCIARIA S.p.A. (formerly known as SPERLARI S.p.A.), SPERLARI s.r.l., and HERSHEY FOODS CORPORATION,

Petitioners,

vs.

DAYHOFF, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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22 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Should claims for tortious interference with contract and related claims, brought by a contracting party against defendants which are not parties to the contract, and with which the plaintiff has made no agreement respecting arbitration or forum selection, be dismissed on the basis of an arbitration clause or forum selection clause in the contract?

STATEMENT OF INTERESTED PARTIES

The parties are stated correctly in the caption to the petition for a writ of certiorari.

Pursuant to S. Ct. Rule 29.6, respondent Dayhoff, Inc., states that its former parent corporation, now a shareholder, is Dayhoff Australia Pty, Ltd. Respondent does not have a nonwholly owned subsidiary corporation.

TABLE OF CONTENTS

	Page
Counterstatement of Question Presented	i
Statement of Interested Parties	ii
Table of Contents	iii
Table of Citations	iv
Counterstatement of the Case	1
Reasons for Denying the Writ	4
I. The Court of Appeals correctly applied the teaching of this Court's decision in *First Options of Chicago, Inc. v. Kaplan.*	4
II. The conflicts alleged by petitioners do not warrant certiorari because the courts of appeals have not yet had the opportunity to reconsider their precedents in light of this Court's decision in *Kaplan* and the Third Circuit's application of *Kaplan* here.	8
III. The decision of the Court of Appeals is consistent with traditional rules of contract law and does not threaten the utility of arbitration or forum selection provisions in contracts.	11
IV. The question presented by petitioners is not sufficiently important to warrant review by this Court.	14
Conclusion	16

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Clinton v. Janger, 583 F. Supp. 284 (N.D. Ill. 1984) 9

Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287 (3d Cir. 1996) 1, 2, 5, 6, 7, 10, 12, 13

First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920 (1995) 4, 5, 6, 7, 8, 9, 10, 11, 15

J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315 (4th Cir. 1988) 8, 9, 10

Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503 (3d Cir. 1994), *aff'd*, 115 S. Ct. 1920 (1995) 6, 8

Manetti-Farrow, Inc. v. Gucci America, Inc., 858 F.2d 509 (9th Cir. 1988) 8, 9

Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212 (1995) 5

Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 190 (1994) 8, 9, 10

The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) 11

Contents

Page

Yaindl v. Ingersoll-Rand Co., 422 A.2d 611 (Pa. Super. 1980) 3

Rule Cited:

Supreme Court Rule 15.2 2

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Third Circuit. The opinion of the Court of Appeals, as amended on rehearing, is reported at 86 F.3d 1287 (3d Cir. 1996), and is reproduced in Petitioner's Appendix ("Pet. App.") at 1a-39a, 40a-43a.

COUNTERSTATEMENT OF THE CASE

Petitioners H.J. Heinz Co. ("Heinz"), Heinz Italia, S.p.A. ("Heinz Italia"), Heinz Dolciaria S.p.A. ("Heinz Dolciaria"), Sperlari s.r.l. ("Sperlari"), and Hershey Foods Corporation ("Hershey") seek review of a Third Circuit decision which reversed the dismissal of certain claims brought by respondent Dayhoff, Inc. ("Dayhoff") and remanded for further proceedings in the District Court. The facts are set forth at length in the opinion of the Third Circuit. *See Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1289-93 (3d Cir. 1996) (Pet. App. 3a-14a).

This litigation involves, and the opinion of the Third Circuit discusses, three candy manufacturing or distribution contracts between Dayhoff and Heinz Dolciaria, or between Dayhoff and the predecessor to Heinz Dolciaria, Sperlari S.p.A.[1] As petitioners state, only two contracts are at issue before this Court: the October 19, 1989 License Agreement (the "License Agreement"), and the July 26, 1990 Frutteto Distribution Agreement (the "Distribution Agreement").[2]

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1. Sperlari S.p.A., the predecessor to Heinz Dolciaria, is distinct from petitioner Sperlari.

2. Dayhoff notes that in describing the genesis of the License Agreement, petitioners state that the agreement, "according to Dayhoff," was assigned to Dayhoff by another company, Dayhoff Australia Pty, Ltd. *See* Petition for a Writ (Cont'd)

The License Agreement contains an arbitration clause, providing for international arbitration in Italy, that governs claims between the contracting parties arising under the contract. *See* 86 F.3d at 1289 (Pet. App. 4a). The Distribution Agreement contains a forum selection clause by which the contracting parties submit to the exclusive jurisdiction of the Court of Cremona, Italy. *See id.* at 1290 (Pet. App. 5a). The Petition discusses both provisions at length. *See, e.g.*, Pet. at 2-4, 7-9, 10-11. Petitioners' statement of the "Question Presented," however, omits reference to the arbitration clause as such and mentions only "a forum selection clause" requiring "adjudication" in Italy. Pet. at i. Because the clause in the License Agreement is an arbitration clause which does not require "adjudication" of any kind, petitioners appear to have framed a question that seeks certiorari only with respect to the holding of the Court of Appeals regarding the Distribution Agreement, which does contain a provision regulating adjudication. Nevertheless, because the remainder of the Petition addresses both contracts, and both clauses, Dayhoff will do so as well.

Pursuant to S. Ct. Rule 15.2, Dayhoff hereby calls to the attention of the Court what Dayhoff believes to be a misstatement contained in the Petition. In the "Question Presented," petitioners state unequivocally that the tortious interference claims brought by Dayhoff "*require for their resolution* a determination of whether one signatory has breached the agreement." Pet. at i (emphasis added). Similarly, petitioners argue that "resolution" of Dayhoff's tortious

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(Cont'd)
of Certiorari ("Pet.") at 2. Petitioners' description may suggest that the assignment itself is a matter of dispute; it is not. Neither the assignment nor Dayhoff's right to assert claims under or relating to the License Agreement was controverted before the Third Circuit, *see* 86 F.3d at 1289, 1293 (Pet. App. 3a-4a, 13a), and neither matter is before this Court.

interference claims against certain of petitioners "will turn on the issue of whether Dayhoff's termination constituted a breach of the 1989 License Agreement and the 1990 Frutteto Distribution Agreement – the same issue that the parties to those contracts agreed to have adjudicated in Italy under Italian law." Pet. at 16. Petitioners cite to no authority in support of this proposition.

Petitioners simply *assume* that Dayhoff must prove an actual breach of contract as an element of its claims for tortious interference with contract. There has been no holding from the District Court to this effect, however, and Dayhoff does not concede the point. Dayhoff believes that wrongful action inducing termination of a contract may, in appropriate circumstances, constitute tortious interference with contract even if the contract itself is not breached.[3] Indeed, many jurisdictions recognize a parallel tort of interference with prospective contractual relations, which obviously cannot require a breach of contract because no binding contract exists at the time the tort is committed.

Moreover, the District Court has not yet determined which jurisdiction's law must be applied to Dayhoff's tortious interference claims. Obvious candidates are Pennsylvania and California, among American jurisdictions, and Italy. This and other choice of law questions are expected to be addressed by the District Court as the case draws nearer to trial. Given that the required elements of torts are formulated somewhat differently from state to state, and may be markedly different when the law of foreign countries is considered, without a determination of the governing law any discussion of allegedly mandatory

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3. *See, e.g., Yaindl v. Ingersoll-Rand Co.*, 422 A.2d 611, 618 n.6 (Pa. Super. 1980) ("Of course, an action for intentional interference with the performance of a contract lies even though the contract interfered with is terminable at the will of the parties.").

elements of the tortious interference claims is premature, and likely misleading. In any event, the issues of choice of law and the elements of the tort claims are not the subject of the Petition, nor are petitioners' views on these unresolved issues the appropriate context for considering whether to grant certiorari on the arbitration and forum selection issues.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CORRECTLY APPLIED THE TEACHING OF THIS COURT'S DECISION IN *FIRST OPTIONS OF CHICAGO, INC. V. KAPLAN*.

In declining to permit nonsignatories to enforce contractual arbitration and forum selection clauses against Dayhoff, the Third Circuit simply applied elementary contract law, as explicated most recently by this Court in its unanimous opinion in *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920 (1995). Contrary to the pinched reading offered by petitioners, *Kaplan* plainly stands for the proposition that arbitration clauses (and, by extension, forum selection clauses), like all contracts, must be enforced according to their terms. A party can be required to arbitrate only that which it has agreed to arbitrate, and only with an adversary with which it has agreed to arbitrate.

The precise issues before this Court in *Kaplan*, of course, focused on the standard of review to be applied to decisions regarding arbitrability of disputes. *See* 115 S. Ct. at 1923, 1926. Nevertheless, the decision of the Court on these issues rested firmly on the fundamental principle that "arbitration is simply a matter of contract between the parties; it is a way to resolve

those disputes — *but only those disputes* — that the parties have agreed to submit to arbitration." *Id.* at 1924 (emphasis added). This principle was essential to this Court's decision; indeed, the Court stated that the result "flow[ed] inexorably" from the principle. *Id.* Far from being "general dicta," as petitioners insist, Pet. at 14, the Court's statement of this principle is the crucial starting point for the entire analysis.

This Court observed that "a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligations under a contract)." 115 S. Ct. at 1923. This statement of black letter law is directly applicable to Dayhoff's case, and it demonstrates the propriety of the holding of the Third Circuit. Dayhoff has a constitutional and statutory right to litigate its claims in federal court unless it has made an agreement to the contrary with the defendants. The Third Circuit did not hold that the arbitration and forum selection clauses in Dayhoff's contracts were void or disfavored; rather, the Court of Appeals simply held that Dayhoff had not agreed to an arbitration or forum selection clause with defendants such as Heinz and Hershey. *See* 86 F.3d at 1296-97 (Pet. App. 22a-23a). This holding is consistent with — indeed, compelled by — the teaching of this Court in *Kaplan* that "the basic objective in this area is not to resolve disputes in the quickest manner possible, but to ensure that commercial arbitration agreements, like other contracts, 'are enforced according to their terms.' " 115 S. Ct. at 1925 (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1214 (1995)) (additional internal quotation marks omitted). The Third Circuit correctly enforced Dayhoff's contracts according to their terms, not according to the wishes of petitioners.

Petitioners' exceedingly narrow reading of this Court's decision in *Kaplan* demonstrates petitioners' recognition that

the teaching of *Kaplan* requires the result that the Third Circuit reached below. Because the Court of Appeals followed this teaching admirably, petitioners have attempted to argue that *Kaplan* does not really mean what it says — that its declaration of the bedrock principle for interpreting and applying arbitration agreements is mere background noise, to be disregarded in favor of the sweeping, result-oriented interpretations favored by petitioners. This contention must be rejected. The holdings of *Kaplan* on the narrow standard of review questions are intelligible only in light of *Kaplan*'s clear statement of the general rule governing all arbitration agreements. *Kaplan* mandates the result reached by the Third Circuit in this case.

Petitioners also suggest that *Kaplan* may be distinguished on the basis that the petitioners there "did not agree to arbitration of *any* disputes involving their agreement with First Options," whereas Dayhoff agreed to arbitrate with Heinz Dolciaria. Pet. at 13-14 (emphasis in original). As the decision of the Third Circuit in *Kaplan* makes clear, however, this distinction is tenuous at best as a factual matter, because Mr. Kaplan did sign an arbitration agreement, in a representative capacity, on behalf of a corporation alleged to be his "alter ego." *See Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1506-07, 1520-23 (3d Cir. 1994), *aff'd*, 115 S. Ct. 1920 (1995). Moreover, as a matter of law the distinction is irrelevant, because the simple principle articulated by this Court transcends trivial alignments of parties in individual cases. The Kaplans were not compelled by the courts to arbitrate with First Options because they had not agreed to arbitrate with First Options. Dayhoff has not been compelled to arbitrate with Heinz, Hershey, and the other nonsignatory petitioners because Dayhoff did not agree to arbitrate anything with them. The analogy is precise. The fact that Dayhoff did agree to arbitrate with Heinz Dolciaria is beside the point; the claims against Heinz Dolciaria have been relegated to Italy. *See* 86 F.3d at 1298 (Pet. App. 26a-27a).

Petitioners cavalierly brush aside the fact that, before the District Court, the nonsignatory defendants were in effect offered arbitration and adjudication in Italy as an *option*, that is, the District Court agreed to dismiss Dayhoff's claims against the nonsignatory defendants if they would agree to submit to the various Italian proceedings. *See* 86 F.3d at 1297 (Pet. App. 23a). As the Third Circuit put it: "The very fact that Hershey would have such a choice belies the existence of an agreement between Dayhoff and Hershey, an agreement that purportedly lies at the basis of appellees' argument." *Id.* Petitioners respond that this criticism is "easily answered," Pet. at 14 n.3, but then proceed to provide no answer whatsoever. They merely repeat the terms of the bargain offered by the District Court, neglecting to point out that Hershey and the other nonsignatory defendants expressly disavowed every part of the Dayhoff contracts until the District Court conditioned its dismissal upon their voluntary acceptance of Italian jurisdiction. *See* Pet. App. at 54a.

When Dayhoff commenced this action, it did not have the option of filing an arbitration in Italy against the nonsignatory defendants, because Dayhoff had made no agreements with them. The District Court erroneously granted an option to the nonsignatory defendants, thus ordering arbitration (and foreign adjudication) not in accordance with, but in opposition to, the terms of the contracts. The Third Circuit correctly reversed because there was no agreement to arbitrate, an absence made manifest by the District Court's permitting defendants to accept or decline arbitration as they pleased, but denying that option to Dayhoff. The District Court's approach was completely at odds with *Kaplan*, whereas the Third Circuit correctly followed the teachings of this Court.

II.

THE CONFLICTS ALLEGED BY PETITIONERS DO NOT WARRANT CERTIORARI BECAUSE THE COURTS OF APPEALS HAVE NOT YET HAD THE OPPORTUNITY TO RECONSIDER THEIR PRECEDENTS IN LIGHT OF THIS COURT'S DECISION IN *KAPLAN* AND THE THIRD CIRCUIT'S APPLICATION OF *KAPLAN* HERE.

Petitioners identify three decisions with which the decision of the Third Circuit purportedly is in conflict: *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509 (9th Cir. 1988); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988); and *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 190 (1994). What is most readily apparent about these three decisions is their age: all predate the decision of this Court in *Kaplan*. Indeed, all predate the decision of the Third Circuit in *Kaplan*, which this Court affirmed. Petitioners have not identified any authentic, post-*Kaplan* conflict among the courts of appeals.

Thus, to the extent the opinions in *Manetti-Farrow*, *Rhone Poulenc*, and *Sunkist* are inconsistent with the decision of the Third Circuit here, this Court should deny the petition for a writ of certiorari and allow the courts of appeals time to bring their precedents into conformity with *Kaplan*. It is to be expected that the "conflict" will dissolve after the other courts of appeals become familiar with *Kaplan*'s strong endorsement of contract law fundamentals in arbitration cases, and with the Third Circuit's thoughtful application of *Kaplan* to a multiparty case involving international arbitration and forum selection provisions.

In *Manetti-Farrow*, the Ninth Circuit applied a forum selection clause in a contract between Manetti-Farrow and Gucci Parfums, S.p.A., to tort claims brought by Manetti-Farrow against a variety of Gucci entities. The analysis of the Ninth Circuit concentrated on the question whether the tort claims were related to interpretation of the contract. *See* 858 F.2d at 513-14. The court virtually ignored what *Kaplan* later identified as the salient issue: did the plaintiff actually *agree* to the forum selection clause with the other defendants? The Ninth Circuit dispensed with this question in a short footnote, stating that " 'a range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses.' "[4] *Id.* at 514 n.5 (quoting *Clinton v. Janger*, 583 F. Supp. 284, 290 (N.D. Ill. 1984)). This type of vague policy analysis is completely contrary to the holding of *Kaplan*, as is made clear by substituting "arbitration" for "forum selection" in the quotation from the footnote in *Manetti-Farrow*: "a range of participants, parties and non-parties, should benefit from and be subject to arbitration clauses." This is precisely the opposite of what this Court held in *Kaplan*.

Clearly, *Manetti-Farrow* must be reexamined in light of *Kaplan*, and the appropriate court to carry out that task in the first instance is the Ninth Circuit itself. There is no reason to believe that the Ninth Circuit will not follow the clear teachings of *Kaplan* when an appropriate case comes before it. This Court need not devote its resources to confirming that *Manetti-Farrow* is not good law after *Kaplan*. The inconsistency between *Manetti-Farrow* and the Third Circuit's decision here is not a legitimate, current conflict, and does not warrant the exercise of jurisdiction by this Court.

Both *Rhone Poulenc* and *Sunkist* erroneously emphasized,

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4. Petitioners do not quote this language in their summary of the Ninth Circuit's holding in *Manetti-Farrow*. *See* Pet. at 7-8.

as a justification for allowing a nonparty to enforce an arbitration agreement, the parent-subsidiary relationship between a contracting party and the nonparty seeking to enforce the arbitration clause. *See Rhone Poulenc*, 863 F.2d at 320-21; *see also Sunkist*, 10 F.3d at 757-58. The Third Circuit's response to this type of argument is unanswerable:

> We also point out that Heinz Italia and H.J. Heinz should not by reason of their corporate relationship with Heinz Dolciaria be able to invoke the arbitration and forum selection clauses, for there is no more reason to disregard the corporate structure with respect to such claims as there would be to disregard it with respect to other legal matters.

86 F.3d at 1297 (Pet. App. 22a).[5] Noticeably absent from the opinions in *Rhone Poulenc* and *Sunkist* is attention to the vital norm, emphasized by this Court in *Kaplan*, of enforcing arbitration agreements according to their terms, not according to whichever ad hoc principle of construction captures the greatest number of nonsignatory parties.

The important question, however, is not whether these decisions are at least partially wrong, but rather how the law should be corrected. This Court already has spoken in *Kaplan*, clearly and unanimously. The Third Circuit recognized the significance of *Kaplan* and applied its teachings here. It is to be expected that other courts of appeals, like the Third Circuit, will

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5. In fact, the District Court refused to pierce the corporate veil between Heinz and Heinz Italia, or between Hershey and Heinz Italia, for purposes of attributing jurisdictional contacts. *See* Pet. App. 60a. The Third Circuit reversed on different grounds, finding that personal jurisdiction exists over Heinz Italia. *See* 86 F.3d at 1301-03 (Pet. App. 35a-38a).

follow the teachings of *Kaplan* as they are obligated to do. This Court need not take further action until the other circuits have had such an opportunity.

III.

THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH TRADITIONAL RULES OF CONTRACT LAW AND DOES NOT THREATEN THE UTILITY OF ARBITRATION OR FORUM SELECTION PROVISIONS IN CONTRACTS.

Nothing in the opinion of the Third Circuit threatens to undermine the usefulness of arbitration or forum selection clauses, properly employed, in commercial contracts. Petitioners' fear of the seductive nature of the American jury trial system, *see* Pet. at 15, is exaggerated and misplaced. The opinion of the Court of Appeals here simply reaffirms that arbitration and forum selection clauses will be enforced *according to their terms*, no more and no less. In *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), this Court, faced with a contracting party bent on "ignoring its contract promise to litigate 'any dispute arising' in the English courts," *id.* at 3, enforced a forum selection clause *agreed to by both plaintiff and defendant*. This principle — of treating forum selection clauses according to the normal rules of contract law — was applied appropriately by the Third Circuit here. Adherence to this principle will strengthen, not weaken, contractual agreements to define in advance the parameters of dispute resolution between the contracting parties.

Petitioners suggest that, as a result of the decision in this case, devious plaintiffs will evade arbitration or forum selection clauses "by the simple expedient of pleading a tortious interference claim against an affiliate of the contracting party."

Pet. at 16. This argument is baseless.[6] First, the opinion of the Third Circuit has absolutely no impact on the standards for pleading any type of claim, including claims for tortious interference with contract. If such a claim exists, a plaintiff has every right to plead it, and to assume that the claim will be litigated in the court where it is filed, unless the plaintiff previously agreed with the defendant to resolve such disputes elsewhere. If such a claim does not exist, and the plaintiff is attempting to plead one solely to secure a foothold in federal court, the complaint will be subject to the usual mechanisms for the disposition of meritless claims. Petitioners may believe that it is merely a "simple expedient" for plaintiffs to assert frivolous claims for the sake of a tactical advantage, but Dayhoff does not agree. In any event, even if such an easily exploitable defect is present in the judicial system, it is certainly unrelated to the decision here.

Second, petitioners forget that any party desiring broader protection from an arbitration or forum selection clause, for its affiliates or for itself, may obtain such protection simply by bargaining appropriately and agreeing only to a contract containing clauses with the scope desired. A single sentence in the opinion of the Third Circuit is a complete answer to petitioners' lamentations: "If Heinz Italia and H.J. Heinz wanted to be able to invoke the arbitration and forum selection clauses, they should have directed Heinz Dolciaria to include appropriate language in the 1989 and 1990 agreements allowing them to do so." 86 F.3d at 1297 (Pet. App. 22a).

Finally, petitioners are plainly mistaken in implying, as their argument does, that the existence of tortious interference claims against noncontracting defendants in this case has enabled Dayhoff to "circumvent" the arbitration and forum selection

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6. The argument is also irrelevant to Dayhoff's claims against petitioner Hershey, which is not an affiliate of any contracting party.

clauses in its contracts. Applying a contract according to its terms is enforcement, not circumvention, of the contract; petitioners' rhetoric to the contrary simply begs the question. The Third Circuit has enforced the arbitration and forum selection clauses against Dayhoff according to their terms, and has held that Dayhoff must pursue remedies in Italy against Heinz Dolciaria. *See* 86 F.3d at 1298 (Pet. App. 26a). Nothing has been circumvented. Petitioners' dissatisfaction with the result stems from (1) their unsupported prediction that resolution of the tortious interference claims must involve a determination of whether the contracts were breached;[7] and (2) more important, their unjustified belief that any proceeding that will or might involve such a determination must be treated as a direct claim for breach against Heinz Dolciaria. The Third Circuit properly rejected this sweeping overextension of the contractual rights of Heinz Dolciaria, and this Court should reject it as well.

Petitioners distort the scope of the arbitration and forum selection clauses when they assert that the "issue" of breach of contract is "the same issue that the parties to those contracts agreed to have adjudicated in Italy under Italian law." Pet. at 16. Dayhoff agreed only to have certain *claims*, or "controversies," to use the nomenclature of the arbitration clause, disposed of in Italy. *See* 86 F.3d at 1289 (Pet. App. 4a). The fact that a claim for tortious interference with contract brought by Dayhoff against a noncontracting party might involve an "issue" of whether the contract was breached does not convert that issue into a claim subject to the arbitration or forum selection clauses. Accepting petitioners' argument would mean, in effect, that every signatory to a contract is an indispensable party to any tortious interference litigation touching upon the contract, even if the actual defendants are nonsignatories. Dayhoff is unaware of any

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7. *See* Counterstatement of the Case, *supra*.

authority endorsing this strange view, and petitioners have cited none.

Finally, it should be noted that by prosecuting its claims for tortious interference against the noncontracting defendants, Dayhoff is not "attempt[ing] to obtain the same relief," Pet. at 16, as it might otherwise have obtained on its claims for breach of contract against Heinz Dolciaria. The claims for breach of contract are separate and distinct from the claims for tortious interference. Dayhoff is entitled to a remedy for every claim it succeeds in proving, regardless of defendant or forum.

IV.

THE QUESTION PRESENTED BY PETITIONERS IS NOT SUFFICIENTLY IMPORTANT TO WARRANT REVIEW BY THIS COURT.

The final portion of petitioners' argument reveals fatal flaws in their contention that this Court must intervene to resolve an alleged dispute among the circuits and to head off an avalanche of litigation over arbitration and forum selection clauses. First, petitioners concede that litigation over the proper interpretation of such clauses will proceed "on a case-by-case . . . basis." Pet. at 17. Such litigation would continue, however, even if the Third Circuit had reached the opposite result in this case. Even if the courts were given license to apply arbitration and forum selection clauses in the expansive manner preferred by petitioners, controversies would continue to arise. The language of every contract is different, and even well-established, black letter rules for contractual interpretation have failed to eliminate disputes over mundane matters of contract law. Simply declaring, for example, that an arbitration clause may govern nonsignatory defendants will not prevent litigation. Legions of hopeful plaintiffs will simply argue that the general rule is fine as

far as it goes, but that the specific circumstances and contractual language in their particular cases demand a different result. In fact, the only rule that has any hope of reducing such disagreements is the one unanimously confirmed by this Court and applied by the Third Circuit here: arbitration clauses and forum selection clauses, like all contracts, will be enforced according to their terms. This rule at least will curtail spurious claims of contractual coverage by nonsignatories, such as the claims of petitioners here, which have added two years to this litigation.

Petitioners also concede that the Fourth, Ninth, and Eleventh Circuits — the homes of what petitioners consider to be decisions in conflict with that of the Third Circuit here — likely will face challenges to their ostensible rules as a result of this case. *See* Pet. at 17. In other words, these courts will be asked to reconsider their previous precedents in light of the decision of the Third Circuit here, and in light of this Court's decision in *Kaplan*. This factor alone is sufficient to warrant denial of the Petition. If the allegedly conflicting decisions are to be put to the test, and possibly revised, by all means let the challenges proceed. The "dissenting" courts of appeals very likely will cure their problems themselves, without the need for further direction from this Court. If, after several such cases, the Third Circuit's reading of *Kaplan* were to be emphatically rejected, and other courts of appeals were to hold that defendants may invoke the protection of clauses in contracts to which they are not parties, then perhaps intervention by this Court would be appropriate. In any event, the dispute would be crystallized in a way that it clearly is not today. Until the decisions that conflict with that of the Third Circuit here have been reexamined in light of *Kaplan*, and the decision below, action by this Court would be premature and unnecessary. The Petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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